

In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:)
)
HMH MOTOR SERVICES, INC.) Chapter 11 Case
)
) Number 89-20232
Debtor)

**MEMORANDUM AND ORDER ON DEBTOR'S OBJECTION TO
ALLOWANCE OF PROOF OF CLAIM FILED BY PAUL DRISKELL,
TRUSTEE FOR PAUL AND TRUDY DRISKELL LIVING TRUST**

This matter came on for hearing, after notice, on May 18, 1992. The controversy originally arose from the Debtor's objection to a proof of claim filed by Paul Driskell, Trustee for Paul and Trudy Driskell Living Trust ("Driskell"). In response to the objection, Driskell filed a motion seeking approval of an administrative expense claim relating to a pre-petition unexpired lease. After hearing evidence and argument of counsel, the court publishes these Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Most of the facts are undisputed. On March 15, 1989, Driskell and Debtor entered into a lease pursuant to which Debtor leased certain non-residential real property located in California. The lease was a five year lease beginning on May 1, 1989, with rent at the initial rate of \$30,000.00 per month plus taxes and insurance.

On April 28, 1989, the Debtor filed its Chapter 11 petition. On June 28, 1989, the Debtor filed a motion seeking an order from this court approving assumption of the lease and, on August 29, 1989, after notice and a hearing, this court entered an order approving said assumption.

Beginning in March, 1990, Debtor failed to make its monthly rent payments on time. Although it was able to make untimely rent payments for the months of March, April and May, Debtor defaulted in payment of rent for the month of June, 1990, vacated and quit the premises in July, 1990, and made no further payments of rent or other charges due under the lease.

After Debtor vacated the premises, Driskell attempted to relet the property. Driskell was successful in reletting a portion of the property and gave Debtor credit for the revenues received. However, Driskell has been unable to relet all of the property and the revenues generated from the relet portions of the property have been insufficient to cover the total rent and other charges due under the lease. In these proceedings, Driskell seeks an order from this court awarding Driskell a Chapter 11 administrative expense claim for damages arising out of Debtor's post-petition default under the assumed lease.

Disputed Issues

The evidence and argument of counsel raised three issues. First, Debtor asserts that Driskell is not entitled to any claim, contending that, prior to Debtor's vacating the premises, Debtor and Driskell agreed that Debtor would be released from further liability under the lease. Second, Debtor contends that, even if there was no release, Driskell is estopped by his actions from asserting a claim at this time. Finally, Debtor contends that, even if Driskell prevails on the issues relating to release and estoppel, the amount of Driskell's administrative claim must be limited, pursuant to Section 503(a)(1), to the actual use and benefit of the leased premises to the estate. Debtor contends that, since it vacated the premises and received no benefit, Driskell is entitled to no administrative expense claim. Alternatively, Debtor asked the court to revisit and undo the prior assumption of the lease and thus relegate Driskell's claim to a pre-petition unsecured claim under

Section 502(g). Each of these issues will be discussed separately below.

Release

The defense of release is an affirmative defense. Cf. Rule 8(c) F.R.Civ.P., Bankruptcy Rule 7008(a). Accordingly, Debtor has the burden of establishing the existence of a release. White v. General Motors Corp., Inc., 908 F.2d 669 (10th Cir. 1990).

Since the original lease in question falls under Georgia's Statute of Frauds, any release must also be in writing. Johnson v. Ashkouti, 193 Ga. 810, 389 S.E.2d 27, 28 (1989).

Further:

A release is subject to the same rules of construction as govern ordinary contracts in writing. See Thomaston v. Fort Wayne Pools, 181 Ga. App. 541(1), 352 S.E.2d 794 (1987). ""The language of the contract should be construed in its entirety, and should receive a reasonable construction, and not be extended beyond what is fairly within its terms. Where the language is unambiguous, and but one reasonable construction of the contract is possible, the court must expound it as made. "[Cit.]"[Cit.]" Cutledge v. Aetna Life Ins. Co., 53 Ga. App. 473, 475, 186 S.E. 208 (1936).

Kahn v. Columbus Mills, Inc., 188 Ga. App. 90, 371 S.E.2d 908, 910 (1988), rev'd on other grounds, 259 Ga. 80, 377 S.E.2d 153 (1989).

As with any other contract, "[i]n order for a release to be operative it must be mutually intended by both parties to the contract." Adair v. Park, 97 Ga. App. 719, 104 S.E.2d 473, 475 (1958). Accordingly, the court must look to the evidence presented at trial to determine what the parties "mutually intended." The evidence presented at the hearing is summarized below.

In late May or early June, 1990, Larry Brewer, Debtor's principal ("Brewer"),

contacted Driskell and advised that the Debtor no longer needed the premises and would vacate the same by July 1st. (Transcript, page 20). Brewer indicated that Debtor had lost the business for which the premises was needed and was not in a financial position to continue the lease. Upon being reminded of the remaining term of the lease, Brewer indicated to Driskell that the Debtor would assist Driskell in any way it could in reducing the liability remaining under the lease by allowing Driskell to relet the property or by helping to find a replacement lessee. (Transcript, page 30). Thereafter, Driskell retained Greg Khougaz, an attorney in Los Angeles, California, to represent his interests and Brewer retained Herman Warnock to represent the Debtor's interests. The parties and their counsel had a four-way conversation during which an agreement was reached. There followed thereafter letters between the counsel which both parties acknowledge as containing the agreement reached. (Transcript, page 20, lines 20-25; page 21, lines 1-7; page 65, lines 21-25; and page 66, lines 1-4). However, the parties have radically different contentions of what the agreement was. It is the interpretation of these two letters which presents the most difficult issue in this case.

The first letter (Driskell Exhibit "4"), dated June 12, 1990, was from Khougaz to Warnock. Its relevant provisions state:

Consistent with the terms of the March 15, 1989, lease, the parties acknowledge and have agreed as follows:

1. [Debtor] has not paid the \$30,000.00 monthly rent due June 1, 1990.
2. [Debtor] desires to and will vacate the premises . . . on or before June 22, 1990.
3. Effective June 1, 1990, [Debtor] intends to and hereby does transfer to [Driskell] all of its right, title, and interest in . . . [certain subleases] . . . all amounts collected by [Driskell] from the subleases shall be credited to [Debtor] as mitigation of damages under the master lease.

4. [Debtor] acknowledges that with its permission, [Driskell] has listed the premises for release and/or sale with Coldwell Banker. [Debtor] shall allow [Driskell] and/or Coldwell Banker reasonable access to the property for advertising and/or viewing by prospective tenants and/or purchasers . . .
5. [Driskell] acknowledges that he holds a \$102,000.00 cash deposit and \$14,291.58 in overpayment (regarding taxes and insurance) from [Debtor]. These amounts will be used by [Driskell] in mitigation of damages including rent, taxes, insurance, damages to the premises, and brokers' commissions. Upon sale or release of the premises, any surplus will be returned to [Debtor] . . .

The letter was acknowledged and accepted by Warnock.

Warnock responded with his own letter (Driskell Exhibit "5") which, in pertinent part, provides:

Understanding - Paul Driskell's Re-Entry HMM's Leased Premises.

I have no problems with the terms of the understanding of the parties allowing Mr. Driskell's re-entry of the [premises] leased to HMM; also, I certainly have no problems with HMM providing Mr. Driskell with authority to deal with prospective lessees or optionees "as if there were no lease between HMM and Driskell." Otherwise, no prospect would entertain seriously any agreement of lease -purchase of this property.

Therefore, bona fides can contract with Paul without regard to the lease - purchase agreement terms as exists between our two clients. (Emphasis in original).

It is Debtor's contention that these two letters, when read together, evidence an intention by the parties to limit Debtor's remaining liability under the lease. Debtor contends that Driskell had a third party ready to step into the premises within two months after Debtor left. Debtor asserts that paragraph six of the Khougaz letter is an acknowledgement that Debtor's liability

would be limited to the amount necessary to offset unpaid rent during these two months and that the balance of the security deposit would then be refunded to the Debtor.

As Driskell urges, there is nothing in either letter which provides for such a release or limitation of liability. The Khougaz letter begins, "Consistent with the terms of the . . . lease . . ." As will be discussed below, each of the agreements recited in the letter is consistent with Driskell's rights under the lease following Debtor's default. There is no statement in either letter that liability would be limited to two months. Therefore, the letters, specifically paragraph six of the Khougaz letter, can be read as an acknowledgement of Driskell's rights, consistent with the terms of the lease, to mitigate damages for the remaining lease term by offsetting against the security deposit with the Debtor being entitled to any remaining balance if any existed. *See* lease section 13.03(c). Such a recognition of lease rights would not constitute a release.

Nevertheless, the court determined that paragraph six of the Khougaz letter was ambiguous and allowed, over strong objection of Driskell, parol evidence on the meaning of this paragraph and the understanding of the parties. Warnock testified that it was both his and Khougaz's understanding that Driskell had another tenant who was available to take over the premises. (Transcript, page 65, lines 3-7). He testified that Khougaz believed that, if they could get the Debtor out of the property within two months, they could relet the property, with any unpaid rent during those two months being applied to the deposit and the remaining deposit being refunded to the Debtor. (Transcript, page 77, lines 2-8; page 79, lines 1-9). However, as Warnock acknowledged on cross-examination, the reletting of the property within two months of Debtor's departure was nothing more than an expectation and hope on behalf of Khougaz and Driskell. This was never guaranteed by Khougaz or Driskell. Nor did Warnock request a guarantee. (Transcript, page 82, lines 17-24; page 83, lines 1-2). In fact, Warnock admitted that neither of the above-referenced letters provided that Debtor's liability would be limited. (Transcript, page 83, line 25; page 84, lines

1-6). Further, Warnock's file notes of the telephone conversation with Khougaz were produced. Warnock was unable to point to any notations on his notes regarding the purported release or agreement to limit damages. (Transcript, page 86, lines 17-25; page 87-89; page 90, lines 1-9; Driskell Exhibit "8").

In summary, there is no written or oral evidence before this court that the parties specifically agreed that the debtor would be released from liability after the security deposit was exhausted. Rather, at the very most, the evidence establishes that the parties hoped that the Debtor's liability under the lease would be covered by immediately reletting the property. However, this did not happen and there is no evidence that the parties agreed that Debtor would have no further liability if the property were not relet.

The facts of this case are similar to those found in Adair v. Park, 97 Ga. App. 719, 104 S.E. 2d 473 (1958). There, the plaintiff purchased a Chevrolet and Oldsmobile dealership from the defendant pursuant to a contract that required the defendant to repurchase the dealership if Chevrolet and Oldsmobile refused to approve the transfer of their franchises. When Oldsmobile refused to approve the transfer, the plaintiff sought to enforce the repurchase provisions of the contract and the defendant refused to comply. Upon suit, the defendant alleged that the plaintiff had released him from the repurchase requirement pursuant to an oral conversation by which the plaintiff stated that he believed that he would receive approval from Oldsmobile. Defendant contended that, based on this conversation, he then leased the building in which he had formerly operated his own dealership to a third party. The Court held:

In order for a release to be operative, it must be mutually intended by both parties to the contract. We do not think that the plaintiff's statements made to the defendant amounted to a release nor that he misled the defendant as to any material facts or concealed any facts from the defendant which would operate as an estoppel. The plaintiff merely stated that he intended to

stick by the agreement and that he felt he would be approved by Chevrolet and Oldsmobile and that Oldsmobile would grant him the franchise. This was mere speculation and guess work on his part and the defendant had no right to rely on such speculation and guesses.

104 S.E.2d at 475. The court held that the defendant, being familiar with the franchise transfer process, had no right to rely on such speculation.

Similarly, in the case at bar, the discussions regarding reletting the premises were, as Warnock admitted, nothing more than hopes and expectations. Khougaz gave no guarantee that this would actually occur. (Transcript, page 82, lines 17-24). Clearly, neither Warnock nor Debtor were entitled to rely on such speculation and guess work, especially in light of the fact that Khougaz's letter to Warnock states that the agreement is "consistent with the terms of the . . . lease," which provided for continued liability. In fact, the evidence clearly shows that Debtor did not rely on the hope of an immediate reletting because more than one month after the letters between Khougaz and Warnock, Brewer wrote to Driskell advising that Debtor would "continue to forward any inquiries concerning the purchase or lease of this property to you." (Driskell Exhibit "6"). Had Debtor understood that Driskell already had a tenant for the property which would relieve the Debtor of further liability, Debtor would not have been concerned about forwarding additional inquiries to Driskell.

Debtor argues that the release is evidenced by the fact that the letter from Khougaz did not specifically provide for continuing liability. However, Georgia courts have refused to strip a party of pre-existing legal rights and remedies where the contract does not specifically so provide. For instance, in the case of Jenkins v. Morgan, 100 Ga. App. 561, 112 S.E.2d 23 (1959), the parties to a written promissory note had specifically provided for no interest to maturity. However, the note was silent as to interest after maturity. The court noted that Georgia law specifically provides a right

to interest on obligations after maturity. The court held:

Parties may stipulate for other legal principles to govern their contractual relationship than those prescribed by law, however, these must be expressly stated in the contract. The parties will be presumed to contract under the existing laws, and no intent will be implied to the contrary unless so provided by terms of their agreement. (Emphasis supplied).

112 S.E.2d at 24. Since the note was silent as to interest after maturity, the court held that state law provided that remedy and that nothing in the promissory note acted as a waiver thereof.

By way of analogy, the remedies provision of the lease between Driskell and Debtor specifically provided for continuing liability upon default. Since the parties are presumed to have negotiated under pre-existing obligations, there was no requirement to restate these obligations. In the absence of an express waiver of existing obligations, the court will not impose one by implication or inference.

Further, Debtor contends that Driskell did not assert a claim against the Debtor until after October, 1991, when Debtor made a demand for the return of any remaining security deposit. Debtor contends that Driskell's silence during the intervening fifteen months between the time Debtor vacated the premises and the time Driskell asserted a claim is evidence that the parties intended for there to be no additional liability. However, the absence of demand cuts both ways. While it is true that Driskell made no demand for additional damages under the lease until October, 1991, it is equally true that Debtor made no demand for a return of the deposit balance until that time. It is arguable that had Debtor believed that its liability was limited to damages for the two months prior to reletting and that Debtor would then be entitled to a substantial refund, Debtor would have made a demand for this refund in October, 1990 (two months after Debtor vacated), not in October, 1991. Accordingly, the Court finds that the absence of communication between the

parties from July, 1990, to October, 1991, is inconclusive and does not evidence a release.

As previously stated, Debtor has the burden of proving the existence of a release. The court find that the evidence is insufficient to establish that the parties mutually agreed to a release. This finding is supported by the fact that neither of the letters between the attorneys who negotiated on behalf of the parties specifically provided for a release or limitation of liability. Nor do Warnock's notes of the conversation with Khougaz indicate such an agreement. Warnock's testimony falls short of establishing such an agreement. He testified that Driskell "felt" that within two months the property could be relet, the losses deducted from the security deposit and the balance returned. (Transcript, pages 76-77, 82). His testimony was silent as to what would happen if the property could not be relet, and no guarantee of success in reletting was made to Debtor. In the absence of an express written release, and with the testimony inconclusive as to any waiver of the landlord's rights, I cannot conclude that a release occurred.

Further, even if the evidence supported the existence of a release, the release would fail because of lack of consideration. To be enforceable, a release must be supported by consideration.

Where a party receives no more than the amount legally owed and where at that time there is no dispute existing between the parties, then the absence of any additional consideration (such as settlement of a disputed account), causes the purported release to fail, it being a nudum pactum. [Cits.] Stamsen v. Barrett, 135 Ga. App. 156, 159(1), 217 S.E.2d 320 (1975).

Jones v. Admiral Ins. Co., 195 Ga. App. 765, 395 S.E.2d 234 (1990).

Section 10.03 of the lease provides, in pertinent part:

Remedies. On the occurrence of any material default by Tenant, Landlord may, at any time thereafter, with or without notice or demand, and without limiting Landlord in the exercise of any right or remedy which Landlord may have:

- (a) Terminate Tenant's right to possession of the Property by any lawful means, in which case this Lease shall terminate and Tenant shall immediately surrender possession of the Property to Landlord. In such event, Landlord shall be entitled to recover from Tenant all damages incurred by Landlord by reason of Tenant's default, including (i) the worth at the time of the award of the unpaid Base Rent, Additional Rent and other charges which had been earned at the time of the termination; (ii) the worth at the time of the award of the amount by which the unpaid Base Rent, Additional Rent and other charges which would have been earned after termination until the time of the award exceeds the amount of such rental loss that Tenant proves could have been reasonably avoided; (iii) the worth at the time of the award of the amount by which the unpaid Base Rent, Additional Rent, and other charges which would have been paid for the balance of the term after the time of award exceeds the amount of such rental loss that Tenant proves could have been reasonably avoided; and (iv) any other amount necessary to compensate Landlord for all the detriment proximately caused by Tenant's failure to perform its obligations under the Lease or which in the ordinary course of things would be likely to result therefrom, including, but not limited to, any costs or expenses incurred by Landlord in maintaining or preserving the Property after such default, the cost of recovering possession of the Property, expenses of reletting, including necessary renovation or alteration of the Property, Landlord's reasonable attorneys' fees incurred in connection therewith, and any real estate commission paid or payable. As used in subparts (i) and (ii) above, the "worth at the time of the award" is computed by allowing interest on unpaid amounts at the rate of fifteen percent (15%) per annum, or such lesser amount as may then be the maximum lawful rate. As used in subpart (iii) above, the "worth at the time of the award" is computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of the award, plus 1%. If Tenant shall have abandoned the Property, Landlord shall have the option of (i) retaking possession of the Property and recovering from Tenant the amount specified in this Paragraph 10.03(a), or (ii) proceeding under Paragraph 10.03(b); . . . (Emphasis supplied).

It is undisputed that, prior to vacating the premises, Debtor was in default. Pursuant to the agreement between Debtor and Driskell, Debtor vacated the premises, and agreed to allow Driskell to relet the premises. That is precisely what the lease allowed Driskell to do. Upon default, Debtor had no right to remain in the premises and attempt to relet the premises on its own behalf. Nor did Debtor have a grace period within which to cure the default. Rather, Driskell had the right to immediately demand possession of the premises, terminate the lease, and then relet the premises to mitigate his damages.

Debtor asserts that it provided additional consideration by agreeing to waive its option to purchase. Pursuant to Section 15 of the Addendum to the lease, Debtor had a "first right of refusal" to purchase the property during the initial five year term of the lease if the property was offered for sale. However, as with all other rights of the Debtor under the lease, under Section 10.03(a) this right terminated when the Debtor defaulted and vacated the premises. Again, the termination of this right was something to which Driskell was already legally entitled.

Pursuant to the agreement between Debtor and Driskell, Debtor agreed to allow Driskell to offset future rent against the security deposit. Debtor also assigned to Driskell two subleases on the property. However, under Section 13.03(c), Driskell had the right to "apply all or part of the Security Deposit to any unpaid rent or other charges due from [Debtor]" Further, under Section 9.05 of the lease, upon termination of the lease, Driskell had the right to "terminate any or all subtenancies or succeed to the interest of [Debtor] or sublandlord thereunder." Accordingly, the right to offset unpaid rent against the security deposit and the assignment of the subleases were rights to which Driskell was entitled upon termination of the lease.

In summary, after default, Debtor agreed to provide nothing more than that to which Driskell was already entitled. Accordingly, there was no additional consideration and the

purported release would fail for lack of consideration.

Estoppel

The doctrine of equitable estoppel is also an affirmative defense and the party asserting it must establish that all necessary elements are present. Choat v. Rome Industries, Inc., 462 F.Supp. 728, 730 (N.D.Ga. 1978); Matter of Smith, 51 B.R. 904, 912 (Bankr. M.D.Ga. 1985).

Generally:

Estoppel requires the presence of three elements: "(1) words, acts, conduct or acquiescence causing another to believe in the existence of a certain state of things; (2) willfulness or negligence with regard to the acts, conduct or acquiescence; and (3) detrimental reliance by the other party upon the state of things so indicated [Cits.]."

U.S. for Use of Krupp Steel v. Aetna Ins. Co., 923 F.2d 1521, 1526 (11th Cir. 1991). The court in Choat v. Rome Industries, Inc., 462 F.Supp. 728 (N.D.Ga. 1978), quoting from Atlantic Richfield Co. v. CRA, Inc., 430 F.Supp. 1299 (N.D.Tex. 1975) described the elements of equitable estoppel as follows:

The person against whom the estoppel is to apply must have actual or constructive knowledge of the facts and must have induced, through his words, or conduct, another to rely upon the purported representation. The party seeking to assert estoppel must have had neither knowledge nor a reasonable means or opportunity of obtaining knowledge of the facts and must have relied upon the other party's representations to his detriment.

462 F.Supp. at 730. *Also see* Myers v. Fidelity & Cas. Co. of New York, 759 F.2d 1542, 1548 (11th Cir. 1985).

Finally, "[a] plea of estoppel is not generally favored and should not be maintained except in clear cases." 462 F.Supp. at 730.

The court finds that estoppel is not appropriate in this case. Debtor has failed to prove any intentional misrepresentations on behalf of Driskell on which Debtor could have reasonably relied. As previously held, statements regarding hopes and expectations of reletting the premises were too speculative to support justifiable reliance. Adair v. Park, supra.

Debtor also argues that, because of Driskell's failure to make a prior demand for balances due under the lease, Driskell is estopped from asserting a claim at this time. As the court in Choat v. Rome Industries, Inc., recognized:

[T]here is no dispute that silence may constitute the type of misleading conduct required before the court could estop a party from asserting its rights. It is equally clear that estoppel will not be raised against one because he was silent where there was no duty on him to speak.

462 F.Supp. at 731. Since the lease between the parties provided for Debtor's continued liability, there was no legal duty imposed on Driskell to restate this obligation and silence relating thereto does not result in an estoppel.

Further, as discussed in part 3 of this opinion below, the post-petition breach of the assumed lease gave rise to an administrative expense claim under Section 507(a)(1) in favor of Driskell. Neither the Bankruptcy Code nor Bankruptcy Rules required Driskell to assert this claim prior to confirmation of Debtor's plan. Further, the Amended Chapter 11 Plan submitted by the Debtor in September, 1991, recognizes the rights of administrative claimants to file administrative

claims after confirmation.¹ Accordingly, Driskell was under no legal obligation to assert his administrative claim at a prior date.²

Finally, a necessary element of estoppel is that the party asserting the estoppel must have no reasonable means or opportunity to obtain knowledge of the true facts. In this case, Debtor was represented by counsel during the negotiations after breach. Debtor's counsel could easily have clarified the issue of a release by expressly providing for such a release in his correspondence. However, he did not. Accordingly, even if Debtor had established that it was misled, it cannot argue that it exercised reasonable diligence in discovering the true facts. For the reasons stated herein, the court finds that the Debtor has failed to establish the defense of estoppel.

Amount of Administrative Claim

Section 10.03(a) of the lease, quoted above, provides that, upon breach, Driskell is entitled to damages equal to (a) all past due amounts, together with interest at the rate of 15%; (b) the present value of all remaining sums due under the lease, less amounts received from reletting; and (c) all costs of recovering and maintaining the property, recovering possession thereof, expenses of reletting, and reasonable attorney's fees incurred in connection therewith. At the hearing, Driskell introduced oral and documentary evidence to establish the amounts of these charges.

During the hearing, the court inquired of Driskell as to whether duplicate charges for insurance and taxes were being asserted against the Debtor. Pursuant to the court's instructions,

¹ Article II, Section 1, which addresses the rights of administrative claimants, provides that such claimants will be paid "on the effective date of the plan or from the first available funds in the order of their priority as and when their claims are allowed and ordered by the court."

² Indeed, it can be argued that Driskell's waiting to file the administrative claim until this time was prudent. The lease was breached slightly more than one year after its inception. Had Driskell filed his claim at that time, the bulk of his claim would have been based on anticipated future damages over the remaining four years of the lease. By waiting until now to file his claim, the time frame covered by future damages has been significantly reduced, thereby giving greater certainty to the amount of his claim.

Driskell has submitted an affidavit eliminating any duplicate charges. Pursuant to those recalculations, the amount of past due rent totals \$250,288.02 and the present value of future damages is \$343,145.60, for a total claim of \$593,433.62, plus reasonable attorneys' fees.

Because the Debtor assumed this unexpired lease during the Chapter 11 case, "the estate [became] liable for performance of the entire contract, as if bankruptcy had never intervened." In re Airlift International, Inc., 761 F.2d 1503, 1508 (11th Cir. 1985). Where a breach of an assumed contract occurs, Section 365(g)(2)(A) provides that the breach is a post-petition occurrence. Accordingly, a post-petition breach of an assumed unexpired lease gives rise to an administrative expense claim. 761 F.2d at 1509. Under 11 U.S.C. Section 1129(a)(9) such claims must be paid in full, in cash, on the effective date of a Chapter 11 plan.

Debtor argues that the court, using its equitable powers, should revisit the issue of assumption and treat the lease as if it had never been assumed. Were the court to accept Debtor's position, then, pursuant to Section 365(g)(1), the breach would be treated as a pre-petition event and Driskell's claim would be limited to an unsecured pre-petition claim under Section 502(g), reduced to the amounts allowable under Section 502(b)(6), and that sum could be amortized over the life of the plan.

Debtor also asserts that, even if the court does not revisit the question of assumption, the court should limit the amount of the claim to the actual benefit which the estate received from the vacated premises. Since the estate received no benefit, Debtor argues that Driskell is not entitled to any administrative claim.

On the first issue, the Court declines to revisit the issue of assumption. Under Section 365(g)(1), the rejection of an unexpired lease prior to assumption is treated as a pre-petition

breach. Under Section 502(g), a claim arising from the rejection of an unexpired lease "that has not been assumed" is to be determined and allowed or disallowed under the remaining provisions of Section 502. However, Section 365(g)(2)(A) provides that the rejection of an unexpired lease which has been assumed constitutes a post-petition breach. Thus, the language of the Code evidences Congress' intention to distinguish between the rights of landlords with claims arising from the breach of assumed and unassumed leases. The distinction between assumed and unassumed leases also establishes that Congress clearly understood that there would be times where debtors, after assuming an unexpired lease, would subsequently default. With this knowledge, Congress provided the debtor the initial option to assume or reject. However, Congress did not provide the debtor with a second bite at the apple. This court will not give the Debtor a right which Congress clearly refused to provide.³

Nor will the court accept Debtor's invitation to limit Driskell's claim. The Debtor has provided no authority for this court to limit Driskell's claim. To the contrary, the only two published opinions on this issue have held that the landlord is entitled to an administrative claim equal to the full amount of damages provided for under the lease. Monica Scott, Inc., 123 B.R. 990 (Bankr. Minn. 1991); In re Multech Corp., 47 B.R. 747 (Bankr. N.D. Iowa 1985). In both cases the courts recognized, as I do, and struggled with the "unreasonable price" exacted by Congress in exchange for the statutory negation of bankruptcy default clauses in leases and of possible "ruinous effects" of such an interpretation.⁴ Nevertheless, the conclusions reached by these courts are persuasive. Further, the Eleventh Circuit, in contrasting a creditor's rights under Section 1110, has, *in dictum*, stated that a breach of an assumed unexpired contract under Section 365 would result in

³ Debtor's reliance on Bankruptcy Rule 3008 is misplaced. That rule provides for the reconsideration of orders allowing or disallowing "claims." It does not provide authority for this court to review prior orders on assumption of a lease.

⁴ I cannot fathom why it would not have been sufficient for post-petition payments on an assumed lease to be elevated to administrative priority status but limited in time to the Section 502(b)(6) period. However, Section 502(g) clearly applies this limitation only to breaches of unassumed leases. Such a determination is for Congress and not the Court to make.

an administrative claim for the full amount of the damages provided under the contract. In re Airlift International, Inc., 761 F.2d at 1513. This language strongly suggests that the Eleventh Circuit would adopt the holding, if not the analysis, of the bankruptcy courts in Monica Scott and Multech, supra.

While this court is aware of the potentially disastrous effect that this ruling may have on Debtor's ability to reorganize, or on unsecured creditors who will be subordinated to a claim in excess of half a million dollars, it cannot ignore the will of Congress as expressed in the provisions of Sections 365 and 502. Accordingly, the court finds that Driskell is entitled to an administrative claim for the full amount sought.

ORDER

Having found no release of the Debtor and having determined that Driskell is not estopped from presenting his claim, IT IS THE ORDER OF THIS COURT that Driskell is entitled to a Chapter 11 administrative expense claim in the amount of \$593,433.62, plus reasonable attorneys' fees.

FURTHER ORDERED that counsel for Driskell shall submit an affidavit setting forth the amount of their attorneys' fees, together with sufficient documentation in support thereof, within fifteen (15) days after the date of this order and judgment; and Debtor will have ten (10) days thereafter within which to file an objection thereto, which objection shall contain a detailed explanation of the basis for such objection.

Lamar W. Davis, Jr.

United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of August, 1992.